

Adams v Lewin

2009 NY Slip Op 32833(U)

December 3, 2009

Supreme Court, New York County

Docket Number: 104038/09

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PART 55

Index Number : 104038/2009

ADAMS, FRANCIS V., M.D.

vs.

LEWIN, MARGARET M.D., FACP

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

Justice

INDEX NO.

104038-09

MOTION DATE

MOTION SEQ. NO.

#001

MOTIONICAL NO.

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 411B) were read this notice.

PAGES NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

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4-6
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Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accompanying decision, order, & declaratory judgment.

NB Preliminary Conference 1-4-10 at noon Sat at end Country codes heard are not a to counsel of conference.

Dated:

12/3/09

JANE S. SOLOMON

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
FRANCIS V. ADAMS, M.D.,

Plaintiff,

Index No.: 104038/09

-against-

DECISION, ORDER &
DECLARATORY JUDGMENT

MARGARET LEWIN, M.D., FACP,

Defendant.

-----X
SOLOMON, J.:

FACTUAL BACKGROUND

On August 29, 2002, plaintiff Francis V. Adams, M.D. and Marc K. Siegel, M.D. (Siegel) entered into a lease (the Over-Lease) with Jericho Office, LLC (landlord) for a portion of the seventh floor at 650 First Avenue, New York, New York, to be used as medical offices. The term of the Over-Lease is from September 1, 2002 to August 31, 2012. In 2005, plaintiff subleased a portion of the premises to defendant Margaret Lewin, M.D., FACP.

Article 3 of the Over-Lease (Notice of Motion, Ex. E) states, in pertinent part:

"All fixtures and all paneling, partitions, railing and like installations, installed in the demised premises at any time, either by Tenant or by Owner on Tenant's behalf, shall, upon installation, become the property of Owner and shall remain upon and be surrendered with the demised premises unless Owner, by notice to Tenant no later than twenty (20) days prior to the date fixed as the termination of this lease, elects to relinquish Owner's right thereto and to have them removed by Tenant, in which event the same shall be removed from the demised premises by Tenant prior to the expiration of the lease, at Tenant's expense."

Article 47 of the rider to the Over-Lease (*Id.*, Ex. E)

allows the tenants to sublease the premises, with the prior written consent of the landlord. Subsection "C" of this article provides that no sublease of the premises would be deemed valid unless a copy of the sublease is provided to the landlord, in written and recordable form, within ten days of the execution of the sublease.

The Sublease Agreement, Form 193 (Sublease) (*Id.*, Ex. F), is for a term commencing on September 15, 2005 through August 31, 2012. Paragraph 20 of the Addendum to the Sublease (Addendum) allows defendant to construct a wall and arrange for the installation of telephone and other communication devices, which she "must remove ... and restore the premises subleased by her to its prior undivided condition immediately prior to her vacation from the premises upon demand from either the landlord or [plaintiff]. Paragraph 22 of the Addendum states, in pertinent part:

"Anything herein to the contrary notwithstanding, the Undertenant may elect to cancel/terminate the remaining unexpired term of this Sub-Lease provided and conditioned upon the following: 1) Undertenant shall provide no fewer than ninety (90) days' written notice by certified mail to the Overtenant Adams of Undertenant's election to cancel; 2) Undertenant's cancellation shall be for cause other than Undertenant's relocation of her medical practice within the New York City Metropolitan area; 3) Undertenant must be otherwise in conformity with all of the provisions of this Sub-Lease and current in her rental, CPI, utility and real estate taxes reimbursement; 4) There is no damage to the demised premises; 5) In consideration of same Undertenant agrees that the Overtenant Adams may retain the three (3) months security deposit held by him as liquidated damages; 6) Undertenant shall restore the Sub-Leased premises at her

sole expense pursuant to the provisions of Paragraph 20 of the Addendum to the Sublease Agreement. ..."

The Sublease and Addendum were signed by plaintiff and defendant, and consented to by Dr. Siegel and landlord (*Id.*, Ex. F).

In January 2008, defendant was diagnosed in January 2008 with leukemia. She told plaintiff about her condition and, on March 18, 2008, wrote to him that she would not be able to complete the term of her sublease, and was therefore exercising her cancellation rights (*Id.*, Ex. G), indicating that she did not believe that she would live long enough to complete the term of the Sub-Lease. This letter was delivered in hand by defendant to plaintiff.

On April 1, 2008, plaintiff's counsel indicated that they had discovered that defendant was moving her practice to another location within New York City, and, therefore, plaintiff was holding her responsible for the remainder of the Sub-Lease (Opp. Ex. G). This lawsuit ensued.

THIS MOTION

Plaintiff moves, pursuant to CPLR 3212, for summary judgment, declaring that: (1) the Sublease and Addendum were, and still are, valid and enforceable as against defendant ; (2) defendant's letter, dated March 18, 2008, was not sent by certified mail and was, therefore, in violation of the Sublease and Addendum; (3) the relocation of defendant's medical practice

to 635 Madison Avenue, 8th Floor, New York, NY 10022, was a relocation within the New York City Metropolitan Area and was, therefore, in violation of the Sublease and Addendum; (4) the defendant's cancellation/termination/surrender was in violation of the terms and provisions of the Sublease and Addendum and was, therefore, null and void and without effect; (5) defendant's failure to pay rent, CPI increases, utility charges and Real Estate Escalation Charges were and continue to be in violation of the Sublease and Addendum; and (6) defendant's obligations under the Sublease and Addendum, including but not limited to rent, CPI increases, Real Estate Tax Escalation Charges and utility charges, and any and all other amounts due and owing under the terms and provisions of the Over-Lease and Sublease and Addendum, have continued unabated, and will continue to accrue through to and including August 31, 2012.

Plaintiff also moves for summary judgment on his second cause of action for sums due and owing, as well as dismissal of defendant's first, second and third counterclaims, which seek, respectively, \$20,000 for improvements made by defendant to the premises, return of her security deposit, and a declaration that the Sublease was duly and properly terminated.

In opposition, defendant states that, upon her diagnosis of leukemia, she intended to relocate to California to be near her son. However, after discovering that she would lose

medical insurance for the first eleven months that she would be there, she decided to stay in New York. She also submits a letter from Bruce Raphael, M.D., dated April 23, 2009, indicating that defendant is currently in remission, that she must be continually monitored for the possibility of developing side effects from a new chemotherapy agent, and that she has a "lifelong illness" (*Id.*, Ex. F).

Defendant asserts that plaintiff, as a tenant-in-common, did not have the legal authority to sublease the premises, which renders the Sublease null and void. Furthermore, defendant states that the Sublease was not in conformity with the Over-Lease. In addition, even if it is valid, defendant maintains that plaintiff's actual receipt of her written notice of cancellation is sufficient to meet the requirements of the Sublease; that neither plaintiff nor landlord requested that she remove her fixtures; that her illness was the reason for her cancellation; and that she had paid all charges due and owing under the terms of the Sublease as of June 30, 2008, the date on which she vacated the premises. In reply, plaintiff waived his allegation that defendant failed to pay her electricity bill for the period from April 30 to May 30, 2008, the only item appearing on plaintiff's itemized invoice, (Not. Of Mot., Ex. H), that defendant disputed in her opposition.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Defendant first asserts that the motion papers are defective because they are supported by the affirmation of an attorney who lacks personal knowledge of the facts of the case. However, an attorney's affirmation may be used, as here, to introduce probative documentary evidence. *Ramseur v Hudsonview Company*, 59 AD3d 308 (1st Dept 2009). Furthermore, the motion papers include a supporting affidavit of plaintiff.

Both sides agree that plaintiff and Siegel were tenants-in-common. "Since each tenant in common holds his title and interest independently of the other tenants in common, he may

encumber or dispose of his interest ... without seeking their consent or joinder ... [internal quotation marks and citation omitted]." *Cary v Fisher*, 149 AD2d 890, 892 (3d Dept 1989). "Thus, a tenant in common may transfer, devise, convey, lease, mortgage or otherwise encumber his interest in the land without seeking the consent or joinder of his co-tenants to the transaction [internal quotation marks and citation omitted]." *Anonymous v Anonymous*, 2 Misc 3d 1002(A) *9, 2004 NY Slip Op 50080(U) (Sup Ct, NY County 2004). Therefore, plaintiff had the legal right to sublet his interest without Siegel's consent, provided that he, plaintiff, conforms to the Over-Lease.¹ This he did: The Over-Lease allows plaintiff to sublet, provided that he obtains the written consent of landlord and provides landlord with a copy of the sublease in recordable form. Defendant's assertion that the documents were not in recordable form because they were not acknowledged is irrelevant, as both Siegel and landlord consented to the transaction in writing. Not only does the landlord's signature act as a waiver of its rights, which it is free to do (*Madison Avenue Leasehold, LLC v Madison Bentley Associates LLC*, 30 AD3d 1 [1st Dept 2006], *affd* 8 NY3d 59 [2006] [a waiver is the voluntary relinquishment of a known right]), but, as a subtenant, defendant lacks standing to assert rights

¹ In any event, this argument is not helpful because Siegel signed the Sublease indicating his consent.

belonging to landlord. *Chock Full O'Nuts Corp. v NRP LLC I*, 11 AD3d 385 (1st Dept 2004); *767 Third Avenue v Kadeem Capital Management*, 2002 WL 992059 (App Term, 1st Dept 2002), *affd* 303 AD2d 199 (1st Dept 2003).

The only issue left for consideration is whether defendant complied with the provisions of the Sublease dealing with the cancellation. While it is undisputed that defendant did not send her notice to plaintiff by certified mail, as required by the Sublease, it is also undisputed that plaintiff actually received the written notice that defendant personally delivered. "Strict compliance with the contract's notice provisions [is] not required, for [plaintiff does] not claim that [he] did not receive actual notice or that [he was] in any way prejudiced as a result of this minimal deviation [internal quotation marks and citation omitted]." *Baker v Norman*, 226 AD2d 301, 304 (1st Dept 1996); *Fortune Limousine Service, Inc. v Nextel Communications*, 35 AD3d 350 (2d Dept 2006). Consequently, plaintiff cannot prevail on this argument.

Nevertheless, plaintiff prevails on the substantive argument that defendant failed to meet the contractual requirement for early cancellation of the Sublease. Defendant's argument that the requirements of paragraph 22 of the Sublease were met is contradicted by the documentary evidence appearing in her own papers. Defendant asserts that her reason for cancelling

the Sublease was the fact of her leukemia diagnosis and that she did not expect to live long enough to complete the contractual period. However, just two weeks after she notified plaintiff that she would be cancelling the Sublease, plaintiff's attorney notified her in writing of the discovery that she had leased another medical office in the city of New York. This was almost three months prior to the date which she gave for leaving the premises, and defendant does not dispute that she currently practices medicine in another New York City location. While her medical condition invites sympathy, she cannot rely on it to claim both that she elected to cancel the Sublease so she could end her medical practice, while at the same time continuing with her medical practice elsewhere.

In light of the foregoing, it must be concluded that defendant failed to terminate or cancel the Sublease in accordance with its terms, and consequently, she still is subject to her obligations thereunder.

Defendant's argument that summary judgment is premature because no discovery has taken place is unavailing. She has failed to identify any factual issues, except in a conclusory fashion where plaintiff could provide information to assist her defense. Mere hope that discovery may reveal something is insufficient to preclude summary judgment (*Jorbel v Kopko*, 31 AD3d 612 [2d Dept 2006]).

That portion of plaintiff's motion seeking dismissal of defendant's three counterclaims is granted. Pursuant to the terms of the Over-Lease, Sublease, and Addendum, any improvements made to the premises are the property of landlord, so she is not entitled to reimbursement for their cost and, since it has been determined that she did not effectively cancel the Sublease, she is not now entitled to the return of her security deposit at this time, nor is she entitled to a declaration that the Sublease was effectively terminated by her.

Based on the foregoing, it hereby is

ORDERED that plaintiff's motion is granted to the extent that it is

ADJUDGED and DECLARED that:

- (1) the Sublease and Addendum were, and still are, valid and enforceable as against defendant Margaret Lewin, M.D., FACP;
- (2) the relocation of defendant's medical practice to 635 Madison Avenue, 8th Floor, New York, NY 10022, was a relocation within the New York City Metropolitan Area and was, therefore, in violation of the Sublease and Addendum;
- (3) the defendant's cancellation/termination/surrender was in violation of the terms and provisions of the Sublease and Addendum and was, therefore, null and void and without effect;
- (4) defendant's failure to pay rent, CPI increases,

utility charges and Real Estate Escalation Charges were and continue to be in violation of the Sublease and Addendum; and

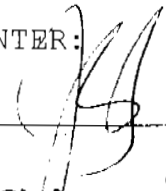
(5) defendant's obligations under the Sublease and Addendum, including but not limited to rent, CPI increases, Real Estate Tax Escalation Charges and utility charges, and any and all other amounts due and owing under the terms and provisions of the Over-Lease and Sublease and Addendum have continued unabated and will continue to accrue through to and including August 31, 2012; and it is further

ORDERED that defendant is found liable to plaintiff on the second cause of action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that defendant's counterclaims are dismissed; and it is further

ORDERED that counsel shall appear in Part 55, 60 Centre Street, Room 432, New York, New York for a preliminary conference on January 4, 2010 at noon.

Dated: December 3, 2009

ENTER: 

J.S.C.

UNFILED JUDGMENT

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NE S. SOLOMON